Filed 8/29/19 P. v. Corral CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LUIS GERARDO ARCE CORRAL, Defendant and Appellant.	B292137 (Los Angeles County Super. Ct. No. KA083524)

APPEAL from an order of the Superior Court of Los Angeles County. Thomas C. Falls, Judge. Affirmed.

Law Office of David W. Williams, David W. Williams for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Gregory B. Wagner, Deputy Attorney General, for Plaintiff and Respondent.

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Luis Gerardo Arce Corral (defendant) filed a motion in 2018 seeking to vacate his 2008 plea to a drug-related felony. The trial court denied his motion. We conclude there was no error, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *Underlying facts*

In June 2008, a police officer found defendant sitting in the rear seat of a parked car displaying expired registration tags. Defendant looked nervous, "couldn't sit still," and kept reaching into his pants pockets. The officer asked if he could search defendant's person, and defendant agreed and got out of the car. The ensuing pat down turned up two baggies containing methamphetamine in one of defendant's pockets. After waiving his rights to silence and to speak with an attorney, defendant admitted that the drugs were his.

B. *Prosecution, plea and dismissal*

The People charged defendant with a single felony count of possessing methamphetamine (Health & Safety Code, § 11377, subd (a)).

On August 5, 2008, defendant pled guilty to the charge so that he could participate in the special drug program authorized by the Substance Abuse and Crime Prevention Act of 2000 (and also known as Proposition 36). (Pen. Code, § 1210.1.)[1] Prior to entering his plea, defendant signed an Advisement of Rights, Waiver and Plea Form (Plea Form) specifying, among other things, that (1) "if [defendant] successfully complete[d] all of the

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

conditions of [his] probation," he could "petition . . . to set aside the conviction and dismiss the charges," or (2) any such dismissal did not relieve defendant of the duty to disclose the conviction if he applied to be a peace officer or for a state license, or if he sought to contract with the State Lottery or serve on a jury. The Plea Form also specified that "if [defendant was] not a citizen, [his] guilty . . . plea will result in [his] deportation (removal), exclusion from admission to the United States, or denial of naturalization." A Spanish-language translator read the Plea Form to defendant and defendant initialed next to each of the above stated advisements. Defendant then entered his plea of guilty, and the court accepted the plea.[2]

On August 12, 2008, the trial court sentenced defendant to three years of formal probation so that he could participate in the Proposition 36 program for two different convictions—namely, (1) his 2008 conviction and (2) a 2006 conviction for which defendant had previously been placed on (but not successfully completed) deferred entry of judgment (§ 1000 et seq.), which is a different drug rehabilitation program.

Fourteen months later, on October 4, 2009, the trial court found that defendant had successfully completed the Proposition 36 drug treatment program, and consequently set aside defendant's convictions and dismissed the underlying charges.

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[2] The reporter's transcript of the plea colloquy is unavailable, although the minute order from that colloquy indicates that defendant was informed that his "conviction," if defendant were not a citizen, "will have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

C. *Subsequent arrest and immigration proceedings*

In 2013, defendant was arrested for another drug-related crime. Because defendant is not a United States citizen, immigration proceedings were initiated against him in 2013.

II. Procedural Background

In June 2018, defendant filed a motion to vacate his 2008 plea on the grounds that (1) he did not receive the advisements required by section 1016.5, and (2) the attorney who represented him during the plea was constitutionally ineffective.[3] In his motion, defendant argued that he had received deficient advisements and advice about the immigration consequences of his plea because he was never explicitly told—by either the court or his attorney—that those consequences would remain even if his conviction was dismissed under Proposition 36. Along with his motion, defendant submitted a declaration attesting that (1) his lawyer both never spoke with him and spoke with him and told him to take the deal, and (2) defendant would not have pled guilty had he known that dismissal under Proposition 36 did not wipe away the immigration consequences of his plea.

The trial court denied the motion to vacate. The court rejected defendant's section 1016.5 argument because defendant had received the advisements required by that section. The court also rejected defendant's ineffective assistance of counsel argument because (1) defendant did not seek relief until five years *after* removal proceedings had been initiated, rendering his motion to vacate untimely, and (2) defendant did not receive ineffective assistance because he had received "a greater

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[3] Defendant filed motions to vacate in January 2018 and March 2018, but each motion was taken off calendar without any ruling.

advisement than was required [and] that put him on notice that he would be deported" if he pled guilty. In coming to these conclusions, the court found some of the assertions in defendant's declaration not to be credible.

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant's motion to vacate rests on alleged violations of section 1016.5 and defendant's constitutional right to the effective assistance of counsel. Each is a distinctive legal ground with its own legal standard. We must accordingly evaluate each ground separately. We review the denial of a motion to vacate under section 1016.5 for an abuse of discretion (*People v. Limon* (2009) 179 Cal.App.4th 1514, 1517-1518), but evaluate a claim of ineffective assistance of counsel de novo subject to reviewing subsidiary factual findings for substantial evidence (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76 (*Ogunmowo*)).

I. Section 1016.5

Section 1016.5 requires a trial court, before accepting a plea to a criminal charge, to advise a defendant that his or her plea "may" lead to three possible adverse immigration consequences—namely, deportation (which is now called "removal"), exclusion from admission, or denial of naturalization. (§ 1016.5, subd. (a).) A trial court's failure to do so authorizes a defendant to file a motion to vacate the ensuing plea. (§ 1016.5, subd. (b).) To prevail on a statutory motion to vacate under section 1016.5, the defendant "must establish (1) that the advisements were not given; (2) that the conviction may result in adverse immigration consequences; and (3) that the defendant would not have pled guilty or no contest had [the] proper

advisements been given." (*People v. Arriaga* (2014) 58 Cal.4th 950, 957-958; *People v. Totari* (2002) 28 Cal.4th 876, 881.)

The trial court did not abuse its discretion in denying defendant's motion to vacate under section 1016.5 because defendant was given the proper advisements. Both the Plea Form defendant signed and the minute order from the plea colloquy established that defendant was advised that deportation, exclusion or denial of naturalization would follow from his plea. (*People v. Araujo* (2016) 243 Cal.App.4th 759, 763.) This is all section 1016.5 requires. Defendant's entreaty that we construe section 1016.5 to require a trial court to discuss the further nuances and complexities of immigration consequences for pleas that may be later withdrawn goes beyond section 1016.5's "narrow" mandate. (See *ibid.* [rejecting argument that section 1016.5 requires court to make advisements beyond those expressly set forth in that section]; *People v. Chien* (2008) 159 Cal.App.4th 1283, 1288 [narrowing section 1016.5's "narrow requirements and precise remedy"].)

II. Ineffective Assistance of Counsel

Defendant's ineffective assistance of counsel claim may be raised as a basis for relief in a motion brought under section 1473.7. (§ 1473.7, subd. (a)(1).) An attorney provides constitutionally ineffective assistance if (1) her representation was deficient, and (2) prejudice flows from that deficient representation. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) We need not confront whether the performance of defendant's attorney during the 2008 plea was constitutionally deficient for misadvising him that the immigration consequences

of his plea would outlast any Proposition 36 dismissal because his claim fails for two other, independent reasons.[4]

First, defendant's motion to vacate is untimely. Section 1473.7 requires a defendant to act with "due" or "reasonable diligence." (§ 1473.7, subd. (b)(2)(A) & (B) [motion is "deemed untimely" if "not filed with reasonable diligence" after the latter of receiving "notice from immigration authorities that asserts the conviction [at issue] as a basis for removal" or a "final removal order"]; *People v. Espinoza* (2018) 27 Cal.App.5th 908, 914 [noting that a section 1473.7 motion "must be timely"].) Here, defendant was embroiled in immigration proceedings in 2013, yet waited until 2018 to file his motion to vacate. Because no final removal order has issued, this five year delay renders any section 1473.7 motion untimely.[5]

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[4] Our decision not to address the deficient performance element of defendant's ineffective assistance claim renders it unnecessary for us to address (1) whether the "presumption of legal invalidity" attaching to pleas under statutes, such as Proposition 36, calling for the subsequent dismissal of a conviction, has been rebutted (§ 1473.7, subd. (e)(2)), or (2) whether the trial court erred in finding defendant's declaration not to be credible in part because defendant's assertion that his attorney did not speak Spanish conflicted with the trial court's personal knowledge of that attorney's fluency in Spanish.

[5] Because defendant does not expressly invoke section 1473.7 in his motion, we do not measure the timeliness of his petition against when that section was enacted (in January 2017). Even if we did, his petition is still untimely given that defendant knew all of the facts underlying his claim for at least three years by January 2017.

Second, defendant has not established that he was prejudiced by his counsel's alleged misadvisement regarding the immigration consequences. (§ 1473.7, subd. (e)(1) [burden of proof rests with movant].) To begin, defendant has not established that the 2008 conviction at issue here is what is at issue in the pending immigration proceedings. Defendant has two (and potentially three) other drug convictions—a 2004 misdemeanor conviction for possessing a controlled substance, a 2006 misdemeanor conviction for the same (which, as noted above, was converted to a Proposition 36 probation and later dismissed), and whatever grew out of the 2013 drug-related arrest. If the immigration proceedings would have been initiated or resolved in the same way with or without *this* conviction, any misadvisement regarding this conviction was not prejudicial. Defendant has not filled this evidentiary gap.

Further, and more to the point, defendant has not established that prejudice flowed from his counsel's alleged misadvisement under the usual test for ineffective assistance of counsel. (*Strickland*, *supra*, 466 U.S. at p. 687.) When a defendant alleges ineffective assistance that resulted in a plea, "the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted [up]on going to trial.'" (*Lee v. United States* (2017) 137 S.Ct. 1958, 1965 (*Lee*), quoting *Hill v. Lockhart* (1985) 474 U.S. 52, 59.) A defendant's "post hoc assertions . . . about how he would have pleaded but for his attorney's deficiencies" are insufficient to establish prejudice absent "contemporaneous evidence" that "substantiate[s] [the] defendant's [subsequently] expressed preferences." (*Id.* at p. 1967.) Such evidence includes: (1) the likelihood that defendant

would prevail at trial (because a case with overwhelming evidence ostensibly provides strong incentive to enter a plea notwithstanding the immigration consequences), (2) the comparative punishment defendant faced after a plea vis-à-vis after a trial (because a greater dichotomy in potential sentences ostensibly provides strong incentive to enter a plea notwithstanding the immigration consequences), and (3) whether the defendant, contemporaneous with the plea, expressed that immigration consequences were important to his decision-making process (because the absence of such contemporaneous statements ostensibly shows that the immigration consequences did not matter to his decisional calculus). (*Id.* at pp. 1966-1967.)

Although defendant makes, in his declaration, a post hoc assertion that he would not have pled guilty had he known that his plea would have resulted in his deportation, he has offered no contemporaneous evidence to support that assertion. Defendant was not likely to prevail at trial because he was found in possession of methamphetamine and thereafter admitted it was his. Defendant faced up to three years in prison for felony possession of contraband if convicted at trial (Health & Safety Code, § 11377, subd. (a)), while the Proposition 36 plea offered him probation and the opportunity for dismissal of his conviction should he successfully complete the Proposition 36 program. And defendant points to nothing in the record indicating that, back in 2008, he had any concern whatsoever about the immigration consequences of his plea. In short, defendant has not carried his burden to prove that any deficiencies in his counsel's representation affected his decision to plead guilty.

DISPOSITION

The order is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST